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## DEFENSIVE FUNCTION OF PENAL LAW

to work by a very small money reward which was paid to the parents themselves, who now found their offspring no longer mere burdens and nuisances, but promising sources of income for the home.

In these early experiments with industrial training and their results we may find hints and arguments for developing the method with vastly larger knowledge and resources. If a city has multitudes of unclean, immoral, lazy and frivolous youth, a burden and a menace, it is because the systems of poor relief and of education are neglected by those who are responsible. Owing to the close relation of poor relief to education in depressed homes, there should be a close co-operation of visitors with the agent of compulsory attendance; for the school alone cannot deal with the economic misery which is so generally associated with parental failure. The most attractive industrial schools and the most vigorous agents of compulsory attendance will back down in the presence of an incurable deficit in the household budget.

CHARLES RICHMOND HENDERSON.

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## THE DEFENSIVE FUNCTION OF PENAL LAW.

When the average American citizen, professional, clerical or lay, is asked the object of penal justice, he replies, "Criminal law (viz. the law made for criminals) punishes men who are guilty of crime. But of course, the punishment must be made not merely to punish. Its first object is to prevent the criminal from repeating his act, and, if possible, to cure him; and, secondly, to deter others from following his example." This answer shows what to our mind is a fundamental misconception of the object of penal justice. The protection of society from anti-social acts is the fundamental duty of criminal law. It should be repressive, deterrent and curative; eliminatory if necessary, but its duty is to be a defense against delinquency. The statement that punishment should be repressive, deterrent and curative, leads to grave error, following a primal law of thought, because it is founded on a basic misconception. Its use entails the loss of the idea that penal justice must protect society at all costs. It gives rise to much misplaced sentimentality, and results in the failure of criminal justice. This sentimentality is the reaction against certain historical qualities which have survived to our day. In order to note what these atavistic qualities are, we will first sketch the history and origin of criminal law. Then noting these qualities, we will show that while repression, deterrence and cure are of course the principal methods of criminal law for the attainment of its end, they are not the end in itself.

## DEFENSIVE FUNCTION OF PENAL LAW

The origin of penal justice lay in private vengeance of man against man, or tribe against tribe. In this stage there was no question of the measure of punishment. It was swift and instantaneous. The agent was found in the act, and without thought of imputability, he was made to suffer for the injury he had done. In the next stage, the head of the tribe having taken over the leadership in war, and tribal vengeance and protection, took upon himself the settlement of dispute within the tribe. Penal justice in the heyday of this phase was military. No thought was taken of moral culpability. But as it approached its succeeding period, the influence of superstition or religion was felt through the combination in the tribal chief, of military leader and priest. This blending of two departments of social government into one finally brought about the religious period of penal justice, in which crime was looked upon as a sin or offense against the deity, and expiation became a part of punishment. The introduction of this foreign element was largely due to the union of priest and military leader in one. Every crime became an offense subversive of his military control, was equally subversive of his religious power, and hence an offense against the superhuman power which he represented on earth. This period continued until the middle ages, when the growing distinction of church and state resulted in the abandonment of the legal protection of religion. But transformed into morality, it continues to be regarded as a factor in crime today. For today, penal law endeavors to do more than protect society from the ravages of anti-social individuals. It endeavors to enforce the tenets of morality, by taking malice, intent and culpability into account. While, as we have already said, its sole duty is to protect society at all costs, using the means suitable to the criminal who has done the act, but never excusing the agent, because his intent was good, if the causal tie between him and the criminal act is proven.

The present status of penal justice is marked by the survival of many of the worst features of all its prior stages. Criminal action is often instituted by the victim of crime, not in order to repair the damage done or to protect himself and society from a repetition of the crime, but in the same spirit of vengeance which marked the beginning of penal justice in prehistoric time. The consideration of the state as a second injured party in every prosecution is a survival from the second stage, when a crime was an injury to the prestige and authority of the tribal chief. The commonwealth should, of course, undertake the administration of penal justice, but its duty is to protect society, not to be the prosecutor, as a party injured by the crime in its political

being.<sup>1</sup> The traces of the third or religious period are generally found transformed into characteristics of the fourth period, still extant. Punishment is measured by the delinquent's culpability or moral turpitude; he is made to expiate his crimes. Just as such phrases as "against the peace and dignity of the state" show the survival of ideas of the second phase, so expiation shows the mark of the religious period. They are such expressions that really indicate the underlying spirit. So, recommendation to the mercy of the court reflects ideas which are unscientific and abandoned in the advance of criminology. The protection of society is the first need, and once the act is imputed to the defendant, the best means of protection should be exerted against him. The best means may not be the severest, but there is no room for such mercy as an omnipotent power may show in the forgiveness of personal offenses. In the courts of penal justice of today, the requisite, and the only requisite for placing the defendant in the hands of the court should be the fact that he is the agent who did the criminal act. Then the judge should deal with him in the manner best fitted to protect society from him. It may be that the act done through passion can never conceivably be repeated; in this case, the man is no danger to society. His example to others must be weighed, and the damage to his victim. And such action must be taken with a view to these two facts, as to show that anti-social acts are harmful to their perpetrator, and to ensure reparation in kind or in equivalent, not in a spirit of vengeance, but of justice.

Society is justified in protecting itself against crime as one of the forms of abnormality, as it is admittedly justified in protecting itself against insanity, epilepsy and disease, other forms of the same taint. There can be, and is no doubt that a man who is likely to kill others can be permanently deprived of his liberty, without his moral improvement being one of the reasons therefor. By the same reasoning, he who steals a loaf of bread when hungry, should be prevented from so doing for the good of others. The doubt which arises with respect to the last proposition shows, as we said at the beginning, the viciousness and loosely reasoned character of the survival of certain discarded notions. There is no doubt that the victim should be protected from the harm done. And yet, there is a feeling that the delinquent is protected by the strength and apparent reasonableness of his motive. Penal laws of

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<sup>1</sup>Of course, this is not true of the subdivision of political crime, wherein the State is the prosecutor and injured party, and brings its action in the courts for its individual protection and the benefit of society, as any other individual or corporate prosecutor should do.

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a scientific nature will accomplish these two ends by proper social organization, removing incompetents from such conditions as result in this impasse. The present impotency of criminal law and the constant increase in the number of criminals during the past half century is caused by the present status of criminal law. The case of the thief is typical. The murderer is acquitted because he was insane, and not morally culpable, since he is morally abnormal. But the truth is that both thief and murderer are abnormal *ex hypothesi*. And the further truth is that their morality has nothing to do with the right of their victim individually and their possible victims collectively to be protected. And, more than that, the morality of their acts has nothing to do with their punibility except in so far as punibility is tinged by its use in prior periods of civilization. If they are morally irresponsible, religion and morality cannot take them to account, but society can demand that they repair the harm they have done, and be restrained from further depredations. This is the duty of penal law, and this must be recognized. Upon its recognition, we can then enact many reforms of a preventive nature, which will reduce criminality. Promotion of economic, educative, family, biological and psychological orders will do more than all the morally improving sentences to put an end to the increase in crime. And the recognition of the right of society to protection from crime will do away with the sentimentality in favor of criminals. The methods of this protection will come. Many of them have come already. But the error which is delaying progress is the survival of archaic ideas, which, in this new environment, have lost their earlier efficiency, and are agencies of vast harm. When the means of moral amelioration and the eliminatory means of social protection were the same, the incumbrance of penal justice with such theories did do no harm. But now that the means of moral amelioration consist largely in forgiveness, trust and kindness, this increased power for harm can be seen at a glance.

In conclusion, the first step towards rendering penal justice a factor in the decrease of the number of criminals, must be to free it from the impeding influence of the theory of moral culpability, and the recognition that the duty of penal justice is to protect society from criminals, taking action necessary for that, without regard to their moral culpability.

JOHN LISLE.